

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CACR04-807

May 31, 2006

BRIAN PIERRE RHODES
APPELLANT

AN APPEAL FROM HEMPSTEAD
COUNTY CIRCUIT COURT
[CR03-190-2]

V.

HON. DUNCAN CULPEPPER, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

This is the second appeal from the revocation of Brian Rhodes's probation. In the first appeal, a no-merit appeal, we remanded for counsel to explain why the overruling of appellant's objection "to the testimony of someone who's not here that I can't cross-examine, based upon hearsay" did not offer a meritorious basis for an appeal.¹ Upon rebriefing, appellant's counsel has chosen to address this issue in an adversarial fashion and now argues that the trial court erred in overruling appellant's objection, because in doing so, the trial court denied appellant his constitutional right to confront the witnesses against him. We agree that the trial court erred in admitting the hearsay testimony but we nonetheless affirm because the error was harmless.

Appellant was placed on five years' probation after he pled guilty to charges of residential burglary and theft. Less than four months later, the State filed a petition to revoke

¹See *Rhodes v. State*, No. CACR 04-807 (February 15, 2006) (not designated for publication).

his probation, asserting that he had violated the terms of his probation by committing an offense in violation of Arkansas law (another burglary), by failing to pay fines and costs, and by failing to pay supervision fees.

A hearing was subsequently held on the State's petition. The testimony adduced was that on October 8, 2003, officers of the Hope Police Department responded to a call concerning a burglary at the home of Olen Byers. The items stolen were a shotgun, a PlayStation, a jar of coins, and two boxes of shotgun shells. Each of the items except the shotgun were found outside of Byers's house. In addition, a shirt and a pair of houseshoes that did not belong to Byers were found in his yard.

Byers arrived home from work at approximately 11:35 p.m. He saw a black male run out of his back door and leave in a white vehicle. Upon seeing that his gun case was open and that one of his shotguns was missing, Byers followed the car. According to Byers, the driver was the only person in the car. Byers followed the car until the driver exited the car through the driver's side door and ran behind a house. By this time, Officer Chad Heath and another officer of the Hope Police Department had arrived at the location where the vehicle had been abandoned. Byers advised the officers that the man who left his house was a black male.

Officer Heath made contact with Cedric Johnson and Michael Evans, who were found within two blocks of Byers's home. Johnson and Evans gave statements in which they stated that Brandy Leopard, who owned the white vehicle, had allowed appellant and Evans to borrow her car. According to their statements, appellant, Johnson, Evans, and Derrick Rhodes (relationship not explained in the record) were riding in the car when appellant said that he wanted to "hit a lick," which means to find a house to rob. They further said that Derrick and appellant dropped them off within two blocks of Byers's house and that they, Johnson and Evans, were acting as lookouts.

Inside the car, Officer Heath found an Arkansas identification card issued to appellant. A cell phone that appellant had borrowed was found in the road near the car. Shortly after the vehicle was found, Heath spoke with Mary Jones, Johnson's grandmother. Jones lived a few blocks from where the vehicle was found. She told Heath that appellant had entered her back door with no shoes on and that he was winded as if he had been running. Jones also identified the houseshoes found at Byers's home as appellant's.

Michael Evans testified on appellant's behalf, insisted that he was responsible for the Byers's burglary, and that appellant was not with him that evening. However, Evans's testimony was discredited on cross-examination. He said that the shoes left at the scene of the crime actually belonged to him, even though Ms. Jones identified them as appellant's. Further, he was unable to account for the fact that the cell phone that appellant had borrowed was found near the vehicle.

Additionally, Evans could not state which items were removed from the house during the burglary. He testified that he had lied to the police in his statements that he had given regarding this matter. He further testified that he was lying in court, but it is not clear precisely which events he admitted to lying about in court. Evans also admitted that he had been charged with burglary in an unrelated case.

Appellant's probation officer, Tony Cox, also testified that the new burglary was the primary reason the petition to revoke had been filed, but that the petition had also been filed because appellant had failed to report on one occasion; had failed to pay his probation fees; and had failed to pay his fines.

Based on the foregoing evidence, the trial court revoked appellant's probation, finding that the State proved each of its allegations. The court sentenced appellant to serve twenty years in the Arkansas Department of Correction on the original burglary charge and to serve ten years on the original theft charge, with the sentences to run concurrently.

I. Confrontation Right

The first issue for this court is whether appellant's confrontation objection was properly preserved. The State argues that appellant's objection was not preserved because his objection was based only on hearsay, not on a constitutional provision or Arkansas law. However, we hold that appellant's objection was properly preserved, because it was not based solely on hearsay, but was based on his confrontation right to cross-examine a witness who was not present.

A defendant's constitutional right to confront the witnesses against him is found in the Sixth Amendment of the United States Constitution and in Article 2, § 10 of the Arkansas Constitution. Further, a defendant's right to confront his accusers during a revocation hearing has been codified in Ark. Code Ann. § 5-4-310(c)(1) (Repl. 2006), which provides that the defendant in a revocation hearing "shall have the right to confront and cross-examine adverse witnesses unless the court specifically finds good cause for not allowing confrontation."

It is well-settled that the Arkansas Rules of Evidence, including the rules regarding hearsay, do not apply in revocation hearings. *Jones v. State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990). However, a defendant retains the right to confront witnesses, even in a revocation proceeding. *Id.* Nonetheless, a mere objection based on hearsay, without more, is not sufficient to raise the right to confront witnesses in a revocation proceeding and to preserve that issue for appellate review. *Fitzpatrick v. State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983). Additionally, in *Goforth v. State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989), we held that in a revocation proceeding, the trial court must balance the probationer's right to confront witnesses against the grounds asserted by the State for not requiring confrontation. The trial court must first assess the explanation offered by the State for why confrontation is undesirable or impracticable. *Id.* A second factor to be considered is the reliability of the

evidence which the government offers in place of live testimony. *Id.*

Here, Officer Courtney testified on direct exam that he took the statements from Johnson and Evans, who told the police that appellant was the burglar and that they acted as lookouts; the statements themselves were not admitted into evidence. Appellant objected to Courtney's testimony concerning what Johnson and Evans said in their statements as follows: "Judge, [sic] and I understand that the Rules of Evidence are very relaxed, but *I'm objecting to the testimony of someone who's not here that I can't cross-examine*, based upon hearsay." (Emphasis added.) Johnson never testified; Evans subsequently testified on appellant's behalf and repudiated the information he had provided in his statement.

We hold that appellant's objection was adequate to preserve his confrontation-right argument. In *Fitzpatrick, supra*, the objection raised, which was *not* sufficient to raise the confrontation issue, was merely that the statement provided to the police constituted hearsay and was inadmissible. By contrast, here, appellant's counsel specifically objected "*to the testimony of someone who's not here that I can't cross-examine*, based upon hearsay." (Emphasis added.) In *Jones, supra*, the objection that was found to be adequate to raise and to preserve the confrontation issue was simply that the defendant would not be able to cross-examine the party who was credited with making incriminating statements against the defendant to the testifying police officer.

Appellant's objection in the instant case is similar to the objection raised in *Jones*, and thus, the objection adequately preserved the confrontation issue. Despite the State's argument, as *Jones* makes clear, appellant was not required to expressly use the words "constitutional right" or to cite specifically to the federal or Arkansas constitutional provisions guaranteeing his confrontation right in order to preserve the issue for appellate review.

Thus, we hold that the trial court erred in admitting Courtney's testimony regarding

Johnson's and Evans's statements. The State here offered no explanation, as required by *Goforth, supra*, as to why Johnson was unavailable to testify. Further, the trial court did not assess the reliability of Officer Courtney's testimony, even though the statements themselves were not offered as evidence. Moreover, in contrast to the hearsay testimony offered in *Fitzpatrick, supra*, it cannot be said that Courtney's testimony regarding the statements would merely be cumulative to other evidence, because the statements provided the only direct evidence identifying appellant as the burglar, and further, because Evans repudiated his statement. Therefore, Courtney's testimony regarding the statements constituted uncorroborated hearsay that was not cumulative to the other evidence. For these reasons, the trial court erred in overruling appellant's objection to Courtney's testimony regarding Johnson's and Evans's statements.

II. Harmless Error

However, the trial court's error constituted harmless error. *See, e.g., Jones, supra* (finding harmless error where the defendant's confrontation right was violated). Appellant does not challenge the sufficiency of the evidence supporting his revocation, because he concedes that the trial court could have properly revoked his probation based on the "technical" violations alone, that is, his failure to report and his failure to pay probation fees and fines.² Normally, where a defendant fails to challenge each basis for revocation, any error that is related to any basis that the defendant does challenge is considered harmless error. *See Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000).

²We note that, while Johnson's and Evans's statements provided the only *direct* evidence that appellant committed burglary, the remaining circumstantial evidence showed that the victim saw a black male leave his house and followed the car, which contained only one person, the driver, who later exited the car and ran away; that the car the victim followed had appellant's identification card in it; that a cell phone appellant had borrowed was found near that vehicle; that appellant's houseshoes were found in the victim's home; and that appellant came to Ms. Jones's home out of breath and barefoot.

Nonetheless, appellant asserts that the trial court's error in denying his constitutional right to confront witnesses was not harmless here because it resulted in a harsher sentence than he would have received had the inadmissible evidence not been considered. He requests that this court reverse his sentence and remand for imposition of a new sentence based on the technical violations alone. His argument is not persuasive.

Appellant was ordered to serve a concurrent sentence of twenty years on the burglary charge and to serve ten years on the theft charge. However, it is well-settled that upon revocation of probation, a trial court may impose any sentence that it could have originally imposed. Ark. Code Ann. § 5-34-309(f)(1)(A) (Supp. 2005); *Bonham v. State*, 73 Ark. App. 320, 43 S.W.3d 753 (2001). Appellant was originally charged with Class B residential burglary, for which he could have originally received a maximum sentence of twenty years. Ark. Code Ann. §§ 5-39-201(a) and 5-4-401(a)(3) (Repl. 2006). The original charge of theft of property was a Class C offense for which appellant could have originally received a maximum sentence of ten years. Ark. Code Ann. §§ 5-36-103(b)(2) and 5-4-401(a)(4). Accordingly, upon revocation, the sentence imposed was within the range that the trial court could have originally imposed.

Further, revocation may be based solely on what are termed *de minimis* violations. *Simmons v. State*, 13 Ark. App. 208, 681 S.W.2d 422 (1985) (holding the trial court did not err in revoking probation for the probationer's failure to pay fines, restitution, and costs as ordered, failure to report to the probation officer, and failure to notify the probation office of his change of address). Clearly, the trial court could have imposed the *same* sentence upon revocation that it imposed had it based revocation *only* upon the "technical" charges. Moreover, the trial court's authority under §§ 5-34-309(f)(1)(A) to impose the maximum sentence that it could have originally imposed is not conditioned in any manner on the nature of the subsequent violation. Accordingly, appellant can demonstrate no prejudice from the

trial court's error in overruling his objection based on the denial of his confrontation right.

Affirmed.

GLADWIN and NEAL, JJ., agree.